United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1506

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

THOMAS FURY and JOHN QUINN,

Appellants.

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B P/S

BRIEF FOR APPELLANT THOMAS FURY

ON APPEAL FROM A JUDGMENT
OF CONVICTION ENTERED IN
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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(b) Was Edward Margolin a proper "applicant" within the meaning of Criminal Procedure Law §700.05 and Title 18 U.S.C. §2516 subdivision one and does §700.05 as it defines "appellant" violate Title three of the Omnibus Crime Control and Safe Streets Act of 1968?

(c) Was the manner in which the Nassau police executed the "Schnell Order" an intentional and flagrant violation of Judge Altimari's order requiring their suppression?

(d) Was the failure to seal the tapes obtained pursuant to the Schnell Order for more than two weeks after the termination of the interception illegal, requiring suppression?

2. Were the Fury Orders invalid because it was not established that normal investigative techniques had been tried and failed or that they would be dangerous?

3. Were the two orders extending the "original Fury Order" invalid because not based upon "present probable cause"?

4. Did the failure of the Law Enforcement Agencies to serve notice upon the appellant within 90 days of their termination in violation of the Criminal Procedure Law and Title three, requiring suppression.

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CASES PRESENTED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

THOMAS FURY and JOHN QUINN,

Appellants.

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PRELIMINARY STATEMENT

Indictment 75 Cr 238 charged John Quinn, Thomas Fury, and Clark Johnston* with one count of conspiring to transport stolen vehicles in interstate commerce (Title 18 U.S.C. section 371; section 2312 and 2) and two counts of knowingly and wilfully transporting and causing to be transported in interstate commerce automobiles known by them to be stolen. (Title 18, United States Code, section 2312 and section 2).

A pre-trial hearing was had before District Judge George Pratt in the Eastern District of New York, upon a motion to suppress evidence obtained pursuant to electronic surveillance. Testimony was taken, and after argument, Judge Pratt denied the motion. (A- 140)** Thereafter, each

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*Mr. Johnston is not a party to this appeal, and upon information and belief, did not file a notice of appeal.
**Number in parenthesis preceded by "A" refers to the page in the joint appendix.

defendant entered a plea of guilty to the first count of the indictment (conspiracy) and the Government consented to the defendants' preservation of their right to appeal from the denial of the motion to suppress. On October 1, 1976, the appellant was sentenced to three years incarceration, to be served consecutively to his sentence upon a State indictment.

On October 8, 1976, a notice of appeal was duly filed, and subsequently, David W. McCarthy was continued as counsel upon appeal pursuant to the Criminal Justice Act.

The appellant is presently located in a facility of the New York State correction system.

STATEMENT OF FACTS

The Nassau Investigation

In early 1974, the Nassau County Police were conducting an investigation into the theft of automobiles in the county. Information was obtained pursuant to the investigation which caused the Nassau District Attorney's office to apply for a wiretap order for two telephones of Myron "Ronnie" Schnell (hereinafter referred to as"Schnell order"). The application was made by Edward Margolin, representing himself to be the "acting District Attorney", as William Cahn, the District Attorney himself, was stated to be out of the County, and "the authority and power of the District Attorney devolves upon your deponent by law to wit: Section 702 of the County Law of the State of New York".

On March 15, 1974, Supreme Court Justice Frank X. Altimari issued an order permitting the wiretap from March 18, 1974, for thirty days (April 16, 1974). No renewals or extensions of this order were ever requested.

The direction of the Court that the execution of the order "...shall be conducted in such a manner as to minimize the interception of communication not otherwise subject to eavesdropping", was intentionally violated by the monitors in making multiple recordings. The primary recording included all conversations had upon the two subject phones. No

attempt was made to discriminate among the conversations as to relevance. The secondary recording was the product of gleaning the relevant conversations from those not deemed pertinent. (H*. 115)**

At midnight, April 16, 1974, (H. 74), the wiretap was terminated pursuant to the order. The remaining tapes, which had not previously been placed in a locker in the police department headquarters were taken there for safe-keeping. The locker key was in the possession of one Sergeant Hertog who Sergeant Madonia was required to contact in order to open the locker (H. 73). Other evidentiary items apparently were also kept in the locker, though unrelated to this case (H. 83,).

It was not until May 1, 1974, that the tape recordings were presented to Mr. Justice Altimari for sealing although the District Attorney's office was notified of termination of the tap as early as April 17, at 10:00 A.M.

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*"H" refers to the minutes of the hearing.

** THE COURT: You say two recordings Sergeant Madonia? Is that duplicate recordings of the same conversations or separate recordings of different conversations?

THE WITNESS: The way the wiretaps are setup, there are two recording machines for each telephone. A primary machine and a secondary machine. The secondary machine would record only those conversations that were criminal in nature. The primary machine would record all conversations in its entirety.

It is my knowing (sic) that this is to be used or could be used as a check against those tapes that were intercepted for use in Court (H. 112)

With respect to the efforts exerted from April 17 to May 1 to have the tapes sealed, Detective Madonia stated:

> A. Well, I had been in constant contact with Assistant District Attorney Arthur Iberson, who had handled the wiretap from the onset. I gave him periodic reports of the progress we had made and at the end of the wiretap I notified him that we had completed the tap and what we had intentions of doing at that point, with respect to arrests and search warrants and so forth. (p. 75)

Furthermore, Detective Madonia testified with respect to the six conversations during the two week hiatus:

> Q. What, if anyting, did you say in the telephone to Mr. Iberson, with respect to the sealing of the tapes?
>
> A. I don't recall specifically saying anything other than what I say now, that I have acknowledged that we did speak of it, but the exact wordings of what I said or he said, I can't recall, but--however, it was an item that was discussed during these telephone calls [H. 76-77].

During that period of time, other persons had access to the tapes, through Sergeant Hartog who kept the key therefor at times in his desk, otherwise in his personal possession (84, 113). The following question and answer capsulizes the attempt of the police officer and the Assistant District Attorney to have the tapes sealed:

> [On Cross Examination]
>
> Q. Do you recall any effort on your behalf or on behalf of any of your subordinates or superiors that you had knowledge of

in that interim period of days, that an effort was made to get the tapes sealed?

A. Yes. My conversations and my telephone calls to Mr. Iberson and Mr. Iberson's telephone calls to me. [H. 103]

In any event, the tapes were not sealed until May 1. Notice of the wiretap was not served upon the appellant until July 24, 1974 (A-155).

The New York City Investigation

The affidavit of Detective Gonzalez, in support of an application by the District Attorney of Queens County, Nicholas Ferraro states that an investigation was being conducted in Queens regarding stolen cars. Aside from a recitation of the appellant's previous arrests, the only information assertedly implicating the appellant in any criminal activity was the transcripts of conversations as set forth in Detective Madonia's affidavit as adopted by Detective Gonzalez. Those two conversations were seized during the execution of the "Schnell order".

Mr. Ferraro's application was submitted to Mr. Justice Bernard Dubin of the Queens Supreme Court on April 26, 1974, and signed the same date (A-88). This order authorized a wiretap of the appellant's telephone from April 29, 1974, to May 28, 1974, "for a period of 24 hours

on each of the said days of the authorized interception".

Subsequently, on May 28, 1974, Mr. Ferraro moved for authorization to continue monitoring the appellant's phone. Judge Dubin signed the order permitting wiretapping from May 29 to June 27, 1974 (A- 99).

On June 27, 1974, a final application was made by Mr. Ferraro. He requested authorization to continue the monitoring of appellant's phone from June 27 to July 26, 1974.* This application was also granted the same day (A-114). [The original order and the extensions are hereinafter referred to as "Fury Orders".]

On July 31, 1974, the tape recordings obtained pursuant to the aforementioned order, which had been terminated on July 26, 1974, were presented to Mr. Justice Leonard L. Finz who, in the absence of Judge Dubin, directed that they be sealed (A-123). The proffered reason for the delay in sealing was that Judge Dubin was on vacation.

Upon the application of Detective Gonzalez, Mr. Justice Dubin postponed service of the notice of the conversations obtained pursuant to the "Fury Orders" on two occasions. The first, signed on October 21, 1974, postponed service of

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*In the interim, an application was made to amend the order to include new offenses. The application therefor, and the supporting papers are not relevant to the contentions hereinafter presented.

notice for no more than ninety days. However, thereafter, notice was not provided as required by the statute, notwithstanding the extension. Rather, three weeks after the period of the postponement had elapsed, a second application for postponement was made and granted (A-124-9). On April 1, 1975, notice was given.

As a result of the "Fury Orders", conversations were intercepted which the Government intended to offer at the trial of the appellants.* Those conversations and the evidence derived therefrom were the subject of the motion to suppress.

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*The Assistant United States Attorney represented that the Government had no intention to offer the two conversations in which the appellant participated which were obtained pursuant to the "Schnell order".

POINT I

THE SEIZURE PURSUANT TO THE "SCHNELL ORDER", OF APPELLANT'S CONVERSATIONS WAS ILLEGAL, REQUIRING THEIR SUPPRESSION AS WELL AS "EVIDENCE DERIVED THEREFROM."

A. The appellant Fury was standing to contest the validity of the "Schnell order".

There is no doubt that the appellant is granted standing to contest the "Schnell order" by the controlling New York State statute* and New York case law, United States v. Manfredi, 488 F. 2d 588 (2d Cir. 1973). Although there is no definition of an "aggrieved person" within Article 700 of the Criminal Procedure Law, which authorizes electronic eavesdropping, §710.10*, specifying the procedures for contesting arguably illegally seized evidence [including eavesdropping**] incorporates by reference Civil Procedure

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*CPL §710.10 (5):
"Aggrieved." An "aggrieved person" included, but is in no wise limited to, an "aggrieved person" as defined in subdivision two of section forty-five hundred six of the civil practice law and rules.

**§710.20 Motion to suppress evidence; in general; grounds for
Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action,..... a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it:

* * * * *

2. Consists of a record of potential testimony reciting of describing declarations or conversations overheard or recorded by means of eavesdropping, obtained under circumstances precluding admissibility thereof in a criminal action against such defendant; or

(footnote continued on next page)

Law and Rules section 4506, subdivision 2. That section provides:

> As used in this section, the term 'aggrieved person' means:
>
> (a) A person who was a sender or receiver of a telephonic or telegraphic communication which was intentionally overheard or recorded by a person other than the sender or receiver thereof, without the consent of the sender or receiver by means of any instrument, device or equipment; or
>
> (b) A party to any conversation or discussion which was intentionally overheard or recorded, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device, or equipment; or
>
> (c) A person against whom the overhearing or recording described in paragraphs (a) and (b) was directed.

In each of the two conversations between Schnell and appellant which were intercepted, the appellant was either the sender or the receiver. There was no contention that consent existed for the wiretap, consequently, appellant is an "aggrieved person"*. People v. Butler, 33 AD 2d 675,

(Footnote continued)

4. Was obtained as a result of other evidence obtained in a manner described in subdivisions one, two, and three.

*There would be little argument as to Fury's status as an "aggrieved person" but for this Court's decision in United States v. Poeta, 455 F. 2d 117 (1972), which restricted standing to a "target" of the tap or one who called from the subject phone. However read, appellant would still be an "aggrieved party" within that ruling, inasmuch as he was a "person against whom the interception was directed". Judge Altimari's order directed interception of conversations of Myron Schnell "in which MYRON RONNIE SCHNELL a/k/a RONNIE SCHNELL discusses with others at this time unknown, all details relating to crimes involving violations...."

(Footnote continued on next page)

305 N.Y.S. 2d 367, aff'd 28 N.Y. 2d 498, 318 N.Y.S. 2d 943 (1971): Matter of Selig, 32 A.D. 2d 213, 302 N.Y.S. 2d 94, (First Dept. 1969); People v. Amsden, 368 N.Y.S. 2d 433 (Eric City Court, 1975); People v. McDonough, 51 Misc. 2d 1065, 275 N.Y.S. 2d 8 (Nassau City Court 1966); United States v. Scott, 504 F. 2d 194 (D.C. 1974); United States v. Kane, 450 F 2d 77 (5th Cir. 1971); United States v. Scasino, 513 F 2d 47 (5th Cir. 1975); United States v. King, 478 F. 2d 494 (9th Circ. 1973). See also, United States v. Garcilaso de la vega, 489 F. 2d 761, 763, cert. denied U.S. , S. Ct. , L. Ed. 2d (19). [By converse reasoning one who is a participant in a phone call is aggrieved.]

(Footnote continued)

It is clear that New York State has elected to expand the definition of "aggrieved person" beyond that in the United States Code as construed by this Court. Permission to contest the illegal interception of one's conversation, in the circumstances of this case, should be determined by whether a "personal" right, rather than a "property" right is to be vindicated. Katz v. United States, 389 U.S. 347, 88 S. Ct. 509, 19 L. Ed. 2d 576 (1967). A person who participates in an illegally seized conversation is as much victimized thereby as someone who is a target or whose telephone is used by another. Conversational expectation of privacy should not be limited to use of a tapped telephone unit or the person named in the wiretap warrant.

B. Edward Margolin was not a proper "applicant" within the meaning of Criminal Procedure Law §700.05 and the Title 18 U.S.C. §2516 (1) and Criminal Procedure Law §700.05 insofar as it defines "applicant" to include an assistant district attorney, under the circumstances of this case, is in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

Criminal Procedure Law §700.05 sets forth the definition of "applicant" as follows:

> "Applicant" means a district attorney or the attorney general or if authorized by the attorney general, the deputy general in charge of the organized crime task force. If a district attorney or the attorney general is actually absent or disabled, the term 'applicant' includes that person designated to act for him and perform his official function in and during his actual absence or disability.

Although this section does not specifically mandate that the designation be in writing, it has been construed to require compliance with County Law §702.* People v. Fusco, 75 Misc. 2d 981, 348 N.Y.S. 2d 858 (Nassau Cty. Ct. 1973);

*County Law §702:

Assistant District Attorneys:

3. The assistant during the absence or inability of the district attorney shall perform the powers and duties of the office of district attorney.

4. In the event that more than one assistant is appointed, the district attorney shall designate in writing and filed in the office of the county clerk and clerk of the board of supervisors the order in which such assistants shall exercise the powers and duties of the office in the event of a vacancy or the absence or inability of such district attorney to perform the duties of the office.

Ct., 1975); In People v. Fusco,

supra, the contention was that the purported applicant, also Mr. Margolin, had failed to establish that he was the "acting District Attorney". In rejecting that argument, the court stated: "[The] [d]efendants do not allege that there was failure to comply with County Law 702 (4) which is a matter of public record ascertainable from either the County Clerk or the Clerk of the Board of Supervisors". 348 N.YS. 2d at p. 866. Similarly, in People v. Schnell, Ind. No. 40055, 1974, Nassau County Ct., (A- 156), Judge Vitale refused to suppress the conversations obtained from the "Schnell order". However, it was argued by the defense that suppression was required because the application had been made by the "acting" District Attorney rather than the District Attorney himself as stated in Title 18 U.S.C. §2516 (2). Judge Vitale similarly noted that there was no allegation of failure to comply with County Law §702.

In Muracca, supra, filing of a certificate merely designating an assistant district attorney as Chief Assistant District Attorney with the County required suppression despite proper filing pursuant to 702 with the Clerk of the County Legislature.

Clearly, the proffered designations in this case do not comply with the County Law. The designation dated June 10, 1970 (A-160), by its own terms is effective in only very limited circumstances--succession in the event of "enemy attack or public disaster". There is no provision for, nor authorization of succession if the District Attorney is actually absent or disabled. By its very terms, it does not comport with 702 or with CPL §700.05 (5). Moreover, the search of the Clerk's office revealed that the only other designation was filed after the application herein (i.e. effective July 8, 1974) (A-161). The Government proffered an "inter-Departmental Memo" dated April 9th, 1971, to establish compliance./ (A-162) However, not only was it deficient because not filed with the County Clerk and the Clerk of the Board of Supervisors, but its language is a mere reiteration of the June 10, 1970, document. It also does not designate successors in the absence or disability of the District Attorney.*

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*Interestingly, next to the description of the "subject" of the memo, the document contains the following words written in long hand: "and 700.05 Criminal Procedure Law". It was acknowledged by the Assistant United States Attorney that this phrase was added by Mr. DeVine, apparently after the document had been signed. More significantly, the effective date of the Criminal Procedure Law was September 1, 1971, some five months after the date reflected on the memo.

The conundrum created by the conflict of the dates of the memorandum and the modification thereof, is compounded by the apparent deletion of the number of persons named. While the word "three" is stricken and "two" inserted, it is not at all clear whose designation has been terminated. Such carelessness can only serve to cast further doubt upon the effectiveness of the designation. The certainty of the line of succession envisioned by the legislature in enacting County Law §702 is noticeable herein by its absence.

Designation of the three persons named therein described as "Acting District Attorney[s]", violates Title III and requires suppression assuming it complies with the New York Statute, United States v. Marion, 535 F. 2d 697, (2d Cir. 1976).

With reference to the definition of "applicant", the legislative history of Title III reflects the following:

> The intent of the proposed provision is to provide for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officers of the State [where state attorney generals authorize the application]...
>
> The intent of the proposed provision is to centralize areawide law enforcement policy in [the county district attorney].
>
> 2 United States Code Congressional and Administrative News 2112, 2187 (1968).

For policy reasons, the Congress evisioned the adoption of a single overall policy in a particular state or local political intity. United States v. Tortorello, 480 F. 2d 764 (2d Cir. 1973). The Supreme Court in United States v. Giordano, 416 U.S. 505, 94 S. Ct. 1820, 40 L. Ed. 2d 341, (1974) commented upon the importance of this requirement and the consequences of deviation therefrom, as follows:

> The words 'unlawfully intercepted' are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling

> for the employment of this extraordinary investigative device. We have already determined that Congress intended not only to limit resort to wiretapping to certain crimes and situations where probable cause is present but also to condition the use of intercept procedures upon the judgment of a senior official in the Department of Justice that the situation is one of those warranting their use. It is reasonable to believe that such a precondition would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use. We are confident that the provision for pre-application approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored. (emphasis added) 416 U.S. at pp. 527-528.

Not only is there aforementioned literal violation of CPL §700.05 (5) because no designation is made for an assistant "...to act for him and perform his official function in and during his actual absence or disability", but a violation, minimally, of the spirit of Title III which Congress foresaw as providing for a carefully circumspect group as applicant. Clearcut accountability and responsiveness to political process is lacking herein. Assuming the efficacy of the April 9, 1971, memo, there existed a "troika" of Acting District Attorneys. The practical effect of such designation is four distinct and possible conflicting policies regarding the use of electronic surveillance. Responsibility for a

uniform policy has been effectively removed. Accountability, as foreseen as a significant factor in restricting those who are authorized applicant, is dissipated when distributed among four persons in the circumstances of this case.*

Berger v. New York,

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*Although, for the purpose of this argument, it has been assumed that CPL §700.05 (5) comports with Title 18, U.S.C. §2516 (2), we contend that the definition of "applicant" in CPL 700.05 is broader than authorized in §2516 (2). That section provides:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with §2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigator or law enforcement officers having responsibility for the investigation of the offense as to which the application is made,...

At the risk of stating the obvious, an acting district attorney is not included within those authorized to make application. Apparently, there is some support for implicit authorization by virtue of the legislative history. See People v. Fusco, supra. In S. Rep. No. 1097, 90th Cong, 2d Sess, 98 (1968; 2 United States Code Congressional and Administrative News 1968, 2112, it is noted:

> Paragraph (2) [of §2516] provides that the principal prosecuting attorney of any political subdivision of a State may authorize an application to a State judge of competent jurisdiction...for an order authorizing the interception of wire or oral communications. The issue of delegation by that officer would be a question of state law.

(Footnote continued on page 16)

To ratify the procedure followed herein, is to authorize the most lax* and ambiguous procedures as satisfying this provision

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(Footnote continued from page 15)

This apparent carte blanche to the states is limited by the subsequent observations in the same legislature history:

> In most States, the principal prosecuting attorney at the next level of a State [after attorney general], usually the county, would be the district attorney, State's attorney, or county solicitor. The intent... is to centralize areawide law enforcement policy in him....Where there are both an attorney general and a district attorney, either could authorize applications, the attorney general anywhere in the State and the district attorney anywhere in his county. The proposed provision does not envision a further breakdown. (emphasis added)

Furthermore, the statutory scheme of careful circumscription of those properly applicants, and responsiveness to political process would preclude this delegation. United States v. Giordano, supra, 416 U.S. 520. Not only would the centralization of policy be circumvented by authorizing Assistant District Attorneys, but it was done in this case, where between two and four persons had responsibility for wiretap policy even assuming the designation valid. Just as the Executive Assistant in Giordano was not responsible to the political process because appointed without the advise and consent of the Senate, the assistant district attorney is an appointive post, without the necessity of prior approval by any person or political body other than the District Attorney.

*Oral designation upon a piecemeal, perhaps case by case basis, would be valid pursuant to the procedure followed here. District Attorney Cahn could simply have dropped into an assistant district attorney's office, told him: "You are acting district attorney while I am out of Nassau" and a "designation" would have been effected. Of course, prior to his next sojourn the same scenario could occur, but nominating a different assistant. It is submitted the obvious invalidity of such chaotic and disorderly practice caused the reference to County Law 702, inaccurate representation that compliance therewith had occurred.

which plays a "central role" in the statutory scheme.

As Edward Margolin was not authorized to apply for the wiretap order, suppression of all conversations to be offered is required. United States v. Giordano.

C. The intentional and flagrant violation of Judge Altimari's order directing minimization of non-pertinent conversations was also in violation of the relevant Federal and New York State statute.

When Judge Altimari signed the "Schnell Order", he included therein, as required by statute,* a directive that the execution thereof "...shall be conducted in such a manner as to minimize the interception of communications not otherwise subject to eavesdropping".

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*Criminal Procedure Law §700.30 subdivision 7 states that the eavesdropping order shall contain:

> A provision that the authorization to intercept... shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article,...

The counterpart of the above in Title III is almost identical:

> (5)...Every order and extension thereof shall contain a provision that the authorization to intercept shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter,... Title 18 U.S.C. §2518.

This "...carefully planned structure[s], on the conduct of electronic surveillance,..." United States v. Giganle, slip opinion 4327, 4333 (2d Cir. decided June 2, 1976), was intentionally, knowingly and flagrantly violated. As Detective Madonia testified, the Nassau Police were operating two tape recorders upon each of the two lines tapped. The "primary" recording, which was automatically activated by the removal of the phone from its cradle, intercepted any and all conversations without limitation. The "secondary" recording purportedly was conducted in accordance with the "Schnell Order" and only conversations evidencing criminal conduct were seized. The proffered purpose for the dual interception was to enable subsequent comparison of the secondary with the primary tape.

The requirement that the court order contained a directive that non-criminal, non-pertinent conversations be minimized is intended to prevent eavesdropping from running afoul of the constitutional prohibition against "general warrants". Berger v. New York, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967). While this Court has viewed the failure to specifically direct minimization in the order as a technical matter, it has emphasized and required de facto compliance with this mandate. United States v. Cirillo, 499 F. 2d 872, 880 (2d Cir. 1974).

Reference to New York Law, reveals construction of this mandate at least as strict as in the Federal Courts and New York law is controlling:

> As this court held recently in United States v. Manfredi, 488 F. 2d 588, 598-599 (2d Cir. 1973), the question whether minimization has been achieved where a motion to suppress evidence gathered under a state warrant is made in a federal prosecution must be answered in the first instance by reference to state law. (p. 217) U.S. v. Rizzo, 491 F. 2d 215 (1974).

In the only appellate decision on this issue, People v. Brenes, A.D. 2d , 385 N.Y.S. 2d 530 (1st Dept. 1976), the Court confronted a factual situation very similar to this case. The monitors intercepted all calls which were automatically recorded in toto. However, to manifest technical compliance with the minimization requirement, they lowered the volume and did not themselves listen to non-pertinent conversations. The court recognized that minimization had been "blatantly" violated and that total suppression was required.

As Judge Birns stated in his concurring opinion:

> In the case at bar there was not the slightest effort by the police to minimize the interception of conversations, as required by law. The law authorizing telephone interception does not contemplate the substitution of electronic repositories for the permanent storage of endless and irrelevant conversations of any number of persons. To protect privacy of those who might be affected by interception, the law requires the discriminating ear of human monitors.
> AD 2d at p. , 385 N.Y.S. 2d at p. 534.

Accord, People v. Sturgis, 76 Misc. 2d 1053,

353 N.Y.S. 2d 942 (N.Y. Cty, 1973); People v. Castania, 340 N.Y.S. 2d 829, 835 (Monreo Ct.,1973)

The proffered mitigation of the unlimited seizure that the primary tape was unheard is unavailing.* The New York Statute is clear that the touchstone of an "intercepted conversation" is that it is overheard or recorded**, in contrast to the Federal statute which seems to focus upon "aural" seizures only.*** Consequently, it is the electronic interception and recordation, in addition to the listening which is prohibited by the New York statute. People v. Brenes,

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*Although Sergeant Madonia testified that the primary tape was not played, later he acknowledged that transcripts of conversations were made at the "plant" site in a Commack school. He did not prepare all the transcripts which were submitted in his affidavit in support of the application for the "Fury order" and could not say that the transcripts were not in fact made from the "primary tape". (H. 125-127)

**Criminal Procedure Law §700.05 (3):
"Intercepted communication" means (a) a telephonic or telegraphic communication which was intentionally overheard or recorded by a person other than the sender or receiver thereof, without the consent of the sender or receiver thereof, by means of any instrument, device, or equipment, or (b) a conversation or discussion which was intentionally overheard or recorded, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device, or equipment.

***Title 18 U.S.C. §2510 (4):
'Intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

supra,; People v. Sturgis, supra, 352 N.Y.S. 2d at p. 951; People v. Castania, supra, 340 N.Y.S. 2d at 835. People v. Kennedy, 75 Misc. 2d 10, 347 N.Y.S. 2d 327, 335 (Greene Cty. Ct., 1973); People v. Holder, 69 Misc. 2d 863, 331 N.Y.S. 2d 557 (Nassau Cty., 1972); United States v. Bynum, 502, n. 6 vacated on other grounds, 485 F 2d 490, 423 U.S. 952 46 L. Ed. 2d 277, 96 S. Ct. 357; opinion on rehearing, 386 F. Supp. 449, aff'd 513 F. 2d 533 cert. denied, 423 U.S. 952, 96 S. Ct. 377, 46 L. Ed. 2d 277.

It is abundantly clear that the Government failed in sustaining its burden to show compliance with the minimization requirement. United States v. Rizzo, supra, 491 F. 2d at p. 217, n. 7; People v. DiStefano, 38 N.Y. 2d 640, 382 N.Y.S. 2d 5 (1976), cf. United States v. Capra, 501 F. 2d 267 (2d Cir 1974) cert. den. 420 U.S. 990 (1975) [good faith effort to minimize required].

The failure to minimize requires the suppression of the two conversations in which the appellant participated in seizued pursuant to the "Schnell order" and the conversation seized pursuant to the "Fury orders".

The District Judge refused to suppress the conversations obtained pursuant to the "Fury orders". Although he observed that certainly "minimization" was the issue raised, he construed the remedy, if one was required, as selective suppression. See United States v. Principie, 531 F. 2d 1132 1139-1140 (2d Cir. 1976) [cert. pet. pending].

> I further find that the argument which is raised is centrally one of minimization, but since there has been no attempt, no attempt first to use the Nassau County tapes, in evidence, secondly there was no attempt to use the complete tape, therefore, there does not appear to be any need for minimization whether or not minimization might be called for in some other action, other circumstances, should someone at some time attempt to make use of the complete tape.

In effect, the Court held that by exercising its option not to offer into evidence the two conversations seized pursuant to the "Schnell order" and not using the "primary"tape, the Government had rendered minimization moot.

However, the Judge misapprehended the law in concluding that there was no forbidden use of the tape. By electing not to offer the two conversations, the Government did not foreclose examination of the effect of the flagrant illegal police conduct. It is not only the seizure which is prohibited but the derivative use thereof.* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S. Ct. 182,

*Title 18 U.S.C. §2515 states:

> Prohibition of use as evidence of intercepted wire or oral communications
>
> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of his chapter.

(Footnote continued on page 23)

64 L. Ed. 319; People v. Brenes, supra, 385 N.Y.S. 2d at p. 532. United States v. Giordano, 416 U.S. 505, 531, 94 S. Ct. 1820, , 40 L. Ed. 2d. 341 (1974).

Judge Pratt misunderstood the significatt part which the seized conversations played in the application for the "Fury orders". Aside from an interpretation of the two telephone conversations themselves, there is no information independent of those conversations arguably establishing probable cause. Detective Gonzalez' affidavit is composed of the following unprobative elements: (1) his statment that he is conducting an "investigation", (2) that Fury goes to a auto yard,* and (3) Fury has been arrested for crimes relating to automobiles. In short, the two conversations were the sine qua non of probable cause. Without the conversations, the application for the "Fury orders" would have been pitifully insufficient to permit a wiretap order.

Fatal to the Government's position, there simply was no evidence establishing that the "Fury orders" were not the product of the exploitation of the flagrant violation of

(Footnote continued)
Furthermore, §2518 (10) (a) which authorized the aggrieved party to institute a motion to suppress provides that the subject of such motion shall be "...the contents of any intercepted wire or oral communication, or evidence derived therefrom,..."

* Had an investigation been conducted and fairness obtained in the application, Detective Gonzalez would have stated that appellant had been an owner and operator of a junk yard at the time, although not the one identified in the affidavit.

Judge Altimari's order as it is the Government's burden to prove. United States v. Ahmed, 347 F. Supp. 912, 935 , aff'd and rev'd on other grounds, 482 F. 2d 171 (3 Cir. 1973); United States v. Magaddino, 496 F. 2d 455 (2d Cir. 1974).

In United States v. Roberts, 477 F. 2d 57 (1973) cert. den. 417 U.S. 908, 918 (1974) the Seventh Circuit noted that the suppression of the fruits of conversations seized pursuant to a wiretap order obtained upon information received from a prior illegal wiretap:*

> '18 U.S.C. §2515 provides that 'no evidence derived' from any intercepted wire or oral communication 'may be received' in evidence in any trial...if disclosure of that information would be in violation of this chapter.' Implementing that Section, 18 U.S.C. §2518 (10) (a) provides that any aggrieved person may move to suppress 'evidence derived' from an unlawfully intercepted communication, and if the motion is granted the contents of the wiretap 'or evidence derived therefrom', shall be treated as having been obtained in violation of the chapter. Taken together, these Sections required Judge McMillen to grant the motions of Leavitt and Shabas because the Government admitted that they were both overheard on the properly suppressed Smith wiretaps in No. 72-1637 which prompted the wiretap applications in No. 72-1729. 477 F. 2d at p. 60.

In accord, United States v. Wac, 498 F. 2d 1227 (6th Cir. 1974); United States v. Giordano, supra,.

*Suppression is mandated by the statute, it is not simply judicially constructed "exclusionary rule". United States v. Giordano, supra, 416 U.S. at p. 524.

Consequently, not only must the Government forego the use of the two conversations themselves, but also the evidence "derived therefrom", more specifically the conversations intercepted pursuant to the "Fury order".*

*It does not appear that this Court has been required to decide that breath of the remedy for failure to minimize. In United States v. Principie, supra, (1972) this Court recited the three alternative remedies proffered by other Courts: (1) suppression only of innocent conversations; (2) suppression of all conversations and (3) blanket suppression in the event of blatant violations of the statute. 531 F. 2d 1139-40. Although the Court avoided deciding among the three, the decision itself is instructive

While there was a blatant violation of the New York court's order forbidding interception of all conversations after 7:30 P.M., the purpose for the restriction was unknown. None of the illegally seized conversation were the basis for extensions and were not otherwise exploited. More importantly, the Court concluded that "the most persuasive argument favoring across-the-board suppression does not apply in this case--the district judge here suppressed evidence that could be sueful to the Government as well as conversations that were innocent". p. 1141. The distinctions between Principie and this case are significant making a compelling case for suppression of all conversations. Not only were the conversations extensively exploited to obtain the "Fury orders", but no conversation was suppressed as in Principie. More importantly, the purpose of the directive, to carefully circumscribe this most intrusive violator of privacy, was obvious, stated in the order as required by statute, and not merely the product of some unexplained whim. Finally, the transgression was "blatant" and flagrant, not merely an unintentional judgmental error.

In any event, New York law requires "across-the-board" suppression. People v. Brenes, supra. See also, United States v. Curreri, 368 F Supp. 757, (D.C. Maryland 1973) aff'd 509 F. 2d 996 (4th Cir. 1975) pet for cert. pending; Title 18 U.S.C. §2515.

D. The failure to seal the tapes obtained by the "Schnell order" for two weeks renders both the wiretap and the subsequent "Fury order" illegal, because it was obtained through the exploitation of the original illegality.

Strict construction of the statutory sealing requirements has become firmly established in both New York State and this Circuit.* People v. Nicoletti, 34 N.Y. 2d, 249 356 N.Y.S. 2d 855 (1974); United States v. Gigante, et al.,

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* A more comprehensive exposition of the sealing issue will be treated in the brief for co-appellant Quinn, In view of the mutual incorporation by reference of our respective argument, redundant in depth discussion of the authorities in this area will be avoided.

F 2d , slip opp./(2d Cir. decided June 22, 1976).

Application of this principle to this case reveals unexplained non-compliance with this mandate.

On April 17, 1974, at 12:01 A.M., the wiretap on Myron Schell's phone was terminated. It was not until May 1, 1974, that the tapes were in fact sealed under the supervision of Judge Altimari and the requisite order signed by him. Detective Madonia was questioned at the pre-trial hearing regarding this lengthy hiatus. While he acknowledged that he knew of the requirement, and stated that he had spoken to Assistant District Attorney Iverson about it, he was unable to offer any explanation whatsoever for this egregious non-compliance.

The sealing mandate is no mere technicality to be dispensed with or even modified by law enforcement officials:

> Clearly, all of the carefully planned strictures on the conduct of electronic surveillance, e.g. the 'minimization' requirement of §2518 (5), would be unavailing if no reliable records existed of the conversations which were, in fact, overheard. Maintenance of the integrity of such evidence is part and parcel of the Congressional plan to 'limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device'. United States v. Giordano, 416 U.S. 505 527 (1974). Moreover, it plays a 'central role in the statutory scheme. Id. at 528. (emphasis added) United States v. Gigaile F 2d , (1976) at p. 4333.

And while there was belated sealing, such a casual attempt at compliance is ineffective. Only a "satisfactory explanation" will justify either non-sealing or sealing not performed "immediately". United States v. Gigante supra at p. 4336. While "immediately" has been construed as not synonymous with "instantaneously", it certainly is not descriptive of a two week duration. More importantly, no explanation was proffered of this delay,* only a recitation of telephone conversations which reference was made to the sealing requirement. This reveals a lax and casual attitude toward this directive which runs afoul of the spirit and letter of Gigante, supra, and New York State Law as enunciated in Nicoletti, supra.

Addressing himself to this issue, the District Judge found a total failure of explanation and implicitly, that such sealing as was done was not "immediate". In a misinterpretation of §700.65, however, he held that subdivision 1 and 2 authorized the communication of information subsequently declared to be illegally seized because the sealing as a requirement was contained only in subdivision 3**.

*The Assistant United States Attorney acknowledged that a satisfactory explanation was not proffered. [H. 129]

**§700.65-Eavesdroppoing warrants; disclosure and use of information; order of amendment:

1. Any law enforcment officer who, by any means authorized by this article, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may disclose such contents to another law enforcement officer to the extent that such disclosure is appropriate to the

(Footnote continued on Page 29)

Criminal Procedure Law (CPL) in language nearly identidical to that of Title 18 USC §2518 (8) (a), §700.65 (3) states:

> 3. Any person who has received, by any means authorized by this article, any information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this article, may disclose the contents of that communication or such derivative evidence while giving testimoney under oath in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by subdivision two of section 700.50, or a satisfactory explanation of the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any communication or evidence derived there from.

The court's misinterpretation stems from the apparently unrestricted use permitted by §700.65 (1) and (2).* However, the prerequisite of sealing recited in subdivision (3) applies not only to presence of a seal as a physical entity but as"provided by subdivision 2 of §700.50" which requires "immediate"sealing. Moreover, the section prohibits the introduction of the conversations seized pursuant to a

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(Footnote continued)
proper performance of the official duties of the officer making or receiving the disclosure.
2. Any law enforcement officer who, by any means authorized by this article, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may use such contents to the extent such use is appropriate to the proper performance of his official duties.
*However, the seizure must have been "authorized". The use of the contents of a conversation the tapes of which have not been sealed, however, is not authorized. People v. Nicoletti.

wiretap improperly sealed and the "evidence derived" therefrom. That the conversations obtained pursuant to the "Fury order" were "evidence derived" from the improperly sealed "Schnell tap" there is no doubt. (see also point I, subdivision C, supra) The conversations seized and contained in Detective Madonia's affidavit were the only significant allegations arguably indicating participation in the scheme, without which there would have been no probable cause. Inasmuch as this requirement "plays a central role in the statutory schemes", and evidence derived from an improperly sealed wiretap will be offered at trial, its disclosure is prohibited and all relevant telephonic conversations must be suppressed. United States v. Giordano 416 U.S. 505, 527. United States v. Gigante, supra.

POINT II

THE "FURY ORDERS" WERE INVALID BECAUSE IT WAS NOT ESTABLISHED THAT NORMAL INVESTIGATIVE TECHNIQUES HAD BEEN TRIED AND FAILED TO THAT THEY WOULD BE DANGEROUS.

A. In an effort to comply with the requirement that applications contain:

> "a full and complete statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence sought"; CPL §700.20 [d]

the police offered a conclusory statement indeed a mere recitation of the statute supported only by the following:

> Normal investigative techniques have been attempted in this case. Investigation herein commenced on April 2, 1974, and investigation was conducted on April 3, 4, 5, 9, 10, 11, 15, 16, 17, 19, 22, 23, and 24. It is very difficult to "tail" the persons names herein because they are very careful and are constantly changing routes and acting in such a way as to locate surveillance vehicles. We have been able to ascertain that Thomas Fury goes often to an auto parts yard at E. 56th Street and Avenue D. in Brooklyn, known as Bergen Auto Parts. This is a fenced in yard wherein the trailer that the "Goldbug" was placed is located. The "Goldbug" was an eavesdropping device placed by the Kings County District Attorneys Office Squad which allegedly obtained substantial information about criminal activities of Paul Vario and his associates. Therefore, the persons around this auto parts yard are very careful and very sensitive to Police surveillance.

It is significant that there are six persons named in Detective Gonzalez' affidavit which is the only source of information arguably satisfying this requirement. Although it is apparent that the police were seeking a tap on Fury's phone, the recitation of ineffective surveillance is unspecific. A statement of the days on which Fury individually acted furtively or in a suspicious manner or in the company of others/would have been a simple matter.*

Indeed, the author of the affidavit perceived this deficiency and tried to rectify it with the unprobative and conclusory statement that he has been able to "ascertain" that Fury goes to a yard which had been the subject of an "eavesdropping device". From that premise and the wholly irrelevant allegation regarding one Vario, he implies that Fury may be careful because others are careful, rather than adducing information showing furtive conduct on Fury's part.

While wiretapping is not expected to be the last resort in investigative tools, its highly offensive character, and most severe invasion of privacy, requires its utilization in only the most highly circumscribed situations. Thus,

*For aught that appears from this affidavit Fury could have been placed under surveillance for a brief period one day, as a mere perfunctory attempt to support this paragraph.

courts have recognized that eavesdropping statutes must be strictly construed. For example, this court in United States v. Capra, 501 F. 2d 267 (1974) this Court observed:

> These standards are to be construed strictly, because Congress knew that it was creating an investigative mechanism which potentially threatened the constitutuional right to privacy, and it carefully wrote into the law the protective procedures for the issuance of warrants which the Supreme Court had declared in [cite omitted] and Berger v. New York [cite omitted], were 'constitutional preconditions of...electronic curveillance". Katz at 359, 88 S. Ct. 507; see 1968 U.S. Cod Cong. and Adm. News. p. 2113.

The instant requirement is a significant safeguard to assure that our legislature's fears of unwarranted intru sions are not realized.

> "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. §§2518 (1) (c) and (3) (c). United States v. Giordano, supra, 416 U.S. at p. 415.

Much more than has been offered here is required to satisfy this requirement. Recitation of unparticularized surveillance is inadequate. United States v. Curreri, 388 F. Supp. 407 (D. Maryland 1974). In United States v. Escandar, 319 F. Supp. 295 (S.D. Fla. 1970) involving a narcotic investigation this argument was rejected, but only after 1-informants refused to testify, 2- physical surveillance was fruitless, 3- negotiations and sales were only taking place over phone, 4- the agents were in actual physical danger and, 5- the conspirators were members of a particularly sophisticated ring. United States v. Falcone, 364 F. Supp. 877 (D.N.J. 1973) [fruitless surveillance, highly selective clientele, no informant able to provide information, operation Keyed to phone, narcotics case], United States v. Leta, 332 F. Supp. 1357 (M.D. Pa. 1971) [confidential informants refused to testify, lockouts warn of approach to headquarters, search warrant cannot be served, operation highly secretive]; seealso United States v. Mainello, 345 F. Supp. 863 (EDNY 1972); United States v. Amocide, 515 F. 2d 29 (3rd Cir. 1975); United States v. Kerrigan, 514 F. 2d 35 (9th Cir. 1975) cert. denied 423 U.S. 990 (1975). In these cases, at least multiple and sincere attempts were made, though fruitless, to use alternative investigative methods.

Moreover, while any larcenous act, by its very nature, seeks to remain undetected, the subject of acts anticipated here, automobiles, cannot be easily secreted. While most of

the cases cited above involve items easily and readily, almost instaniteously disposable like drugs or gambling paraphanelia, rarely can one destroy an automobile upon the approach of suspected law enforcement individuals. There is simply nothing to show that the wiretap was anything more than "...a useful additional tool." People v. Brenes, supra 385 N.Y.S. at p. 531

Because the applicant did not focus upon the defendant in setting forth his limited and half-hearted attempt to satisfy this section, the order was unauthorized and the seized conversation must be suppreseed.

B. In any event, the orders granting the extensions are invalid because there was no statement in the application or order complying with Criminal Procedure Law §700.20 (d) 700.15 (4). Although reference was made to the original application, neither application for an extension, in words or substance, set forth facts establishing that "normal investigative techniques" had been tried anew or would fail if tried. This void requires suppression in o itself because it violates the clear mandate of CPL §700.40 that an "...application for an order of extension must conform in all respects to the provisions of section 700.20..." See also United States v. Bynum, supra 513 F. 2d 533. There being no showing pursuant to §700.15 (4), the extensions were unauthorized. Suppression is required.

POINT III

THE TWO EXTENSION OF THE ORIGINAL "FURY ORDER" ARE INVALID BECAUSE NOT BASED UPON "PRESENT PROBABLE CAUSE".

As the wiretap of the appellant's telephone was about to terminate, District Attorney Ferraro applied for an extension. Proffered as evidence of probable cause were six conversations. Perusal of them and the supporting affidavits establishes that "a further showing of probable cause" was not made. People v. Gnozzo, 31 N.Y. 2d 134, 147, 335 N.Y.S. 2d 257, 261 (1972). Or has been stated there was no "present probable cause" which is required to extend the original order. Berger v. New York, supra 388 U.S.at p. 59.

The only new information proffered consisted of six conversations, the transcripts of which were appended to the application, and observations of appellant "transporting what we believe to be stolen property". No facts are offered supporting the belief.

Analysis of the conversations offered shows they are at best "ambiguous" and certainly unprobative of criminal conduct. Respecting the first conversation, there is no information whatsoever that the conversation about "plates" possesses the sinister meaning reflected in the affidavit.

The reference could very simply have been dinner plates. Indeed, facts showing the conclusion is anything but remote speculation are not offered.*

Rather than proving probable cause, the second conversation is exculpatory. Being informed of the circumstances of "Sonny's" arrest, appellant's response is a highly critical:

> Tom: Oh, that kid is bad, boy. John: I don't know what the hell he is doing, you got get (sic) permission when you take a a truck or car, anything.
>
> Tom: You better believe it.
>
> (A-165)

The third, fifth, seventh, and eighth conversation allegedly refer to stolen merchandise. Yet, again no evidence is offered as to how conversations about pants, shirts, and "fryers" refers to stolen property. Complaints of similar items being pilfered would have filled his void and would have been easily ascertainable. Absence thereof establishes the speculative nature of Detective Gonzalez' affidavit.

The fourth conversation assertedly contains reference to registrations for stolen vehicles. However, again, this interpretation is conclusory, without any explanation based upon the conversation. For example, there is no use of a word or euphemism for "registration". And there is no

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*Even assuming the reference was to automobile plates substantiation of use on stolen cars is not offered and mere possession thereof is no crime or offense. Additionally, appellant was owner and operator of a junkyard and many reasonable explanations for the conversation are likely. For example, plates from junked cars must be returned to the Motor Vehicle Department.

elaboration of what portion of this rambling exchange is probative of Detective Gonzalez' conclusion.

Finally, assuming a "meeting" is the subject of the sixth conversation there is nothing nefarious associated with it--even in the affidavit. In short, the conclusions reached by Detective Gonzalez are rife with hypothesis and unsupported by the intercepted conversations or independent corroborative proof.

While an affidavit is to be read in a common sense fashion to determine probable cause, suspicion is no substitute for probative evidence. Nathanson v. United States, 290 U.S. 41, 54 S. Ct. 11, 78 L. Ed. 159 (1933). Nor is any reliable information offered establishing a crime was committed or that appellant engaged in criminal activity. Agular v. Texas, 378 U.S. 108 84 S. Ct.1509, 12 L. Ed 2d 723 (1964). District Attorney Ferraro's affidavit, relying almost exclusively upon Detective Gonzalez' supporting affidavit, "failed to set forth any of the 'underlying circumstances' necessary to enable the magistrate independently to judge the validity of the" officer's conclusions. Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). The conclusory statements therein are fruitless to show probable cause. People v. Koutnik, 44 A.D. 2d 48, 353 N.Y.S. 2d 197 (1st Dept. 1973) aff'd 37 N.Y. 2d 873, 378 N.Y.S. 2d 360 (1975). See also, People v. McCall, 17 N.Y. 2d 152, 269 N.Y.S. 2d 396 (1966). ["Besides the generaliza-

tion observed in other affidavits, it adds that 'An analysis of calls made to and from' the telephone sought to be intercepted indicates that this telephone is being used in illicit narcotic drug trafficking.' Who made the 'analysis' or what was its basis, or how it was made, or what the facts disclosed were, are not stated." (emphasis added) 269 N.Y.S. 2d at p. 403.]

No probable cause having been shown for the extension of the wiretap order, it was invalid. All the conversations seized pursuant to the two orders authorizing continued wiretapping of appellant's telephone must be suppressed.

POINT IV

THE NEGLECT OF THE RESPECTIVE LAW ENFORCEMENT AGENCIES TO SERVE NOTICE UPON THE APPELLANT OF WIRE-TAPPING WITHIN THE NINETY DAY PERIOD REQUIRES SUPPRESSION.

Both the Federal and New York State statutes authorizing electronic eavesdropping provide that post execution notice of wiretapping be given to persons named in the order and those persons who were parties to conversations seized.*

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*Title 18 U.S.C. §2518 (8) (d) states:

> Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, as inventory which shall included notice of:
>
> (1) the fact of the entry of the order or the application;
>
> (2) the date of the entry and the period of authorized approved or disapproved interception, or the denial of the application;
>
> (3) the fact that during the period wire or oral communications were or were not intercepted.

Criminal Procedure Law §700.50 (3) states:

> Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in subdivision four, written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant and such other parties to the intercepted communications as the justice may determine in his discretion is in the interest of justice.

With respect to the "Schnell order", notice was not upon Mr. Fury for one hundred thirty days (July 24, 1974) after the order had terminated (April 17, 1974). Despite the termination of the wiretap pursuant to the "Fury orders", on July 26, 1974, notice was not served until April 1, 1975, In the latter instance, two postponements had been granted by Mr. Justice Dubin.*

The present posture of the law in this Circuit has been stated in United States v. Principie, supra, 531 F. 2d at p. 1141-1142. Accord, United States v. Rizzo, 492 F. 2d 443, 447 (2d Circ. 1974) cert. denied 417 U.S. 944 (1974). Prejudice is required before suppression will be ordered. See also, United States v. Bohn, 508 F. 2d 1145, 1148 (8th Cir.) cert. denied, 421 U.S. 947, 95 S. Ct. 1676, 44 L. Ed. 2d 100 (1975) [prejudice required] see cases cited therein. United States v. Iannelli, 477 F. 2d 999, 1003, (3d Cir., 1973), aff'd on other grounds, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975) [prejudice required where received actual notice]. United States v. Wolk, 466 F. 2d 1143 (8th Cir. 1972) [informal notice within month of termination, prejudice required]. As noted, however, in Principie, at p. 1141, contrary decisions have been rendered in United States v. Donovan, 513 F. 2d 337 (6th Cir., 1975) [no prejudice required; no notice

*The postponements were assertedly granted upon authority of CPL §700.50 (4):

> On a showing of exigent circumstances to the issuing justice, the service of the notice required by subdivision three may be postponed by order of the justice for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of exigent circumstances.

served] and United States v. Bernstein, 509 F. 2d 996 (4th Cir. 1975) [no prejudice required; actual but not formal notice]. In view of the explicit decision in Principie, supra, rejecting appellant's contention herein, extended discussion will be avoided. It is respectfully submitted, in the first instance, that New York view of this mandate has been established in People v. Hueston, 34 N.Y. 2d 116, 356 N.Y.S. 2d 272 (1974). Although the Court refused to suppress intercepted conversations because notice had been given during the 90 day period, it further stated:

> While we may assume that the lack of such notice [as required by statute], might ordinarily require suppression of the evidence obtained as a result of the warrant (see People v. Tartt, 71 Misc. 2d 955, 336 N.Y.S. 2d 919, Sup. Ct. Erie Cty, 1972), we believe that the special circumstances present in this case compel a different conclusion. 34 N.Y. 2d at p. 120.

The "special circumstances" noted was the overlapping of the previously effective 60 day notice requirement ant the newly adopted 90 day notice. Had the Court construed the requirement as merely necessitating reasonable notice before trial, such would have been the rationale of the decision, and reference to Tartt would have been superfluous.

Moreover, Title 18 U.S.C. §2515 (see n. * p.22 herein) requires suppression. That section prohibits the introduction into a Federal or State trial, evidence derived from a communi-

cation intercepted by electronic surveillance if "disclosure of the information would be in violation of this chapter." Both notices were in violation of §2518 (8) (d) because neither was served within niney days of the original order, or, in the case of the second, within ninety days of the first extension.*

Furthermore, the notice requirement is "central" to the statutory scheme. 2 United States Code Congressional and Administrative News, 1968, 2112, 2194. Disclosure is required not only to assure individual citizens the opportunity to exercise various remedies, but also to assure the "community" that there are no abuses of this extraordinary investigative device. Obviously, Congress has considered promulgation of the use of device required during a precise period so that the vagaries of individual interpretation of what is "reasonable" are not required. Further, prejudice to the law enforcement personnel by hasty revelation is avoided by authorized extensions under proper circumstances. While

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*The first postponement of notice of the "Fury orders" was dated October 21, 1975, delaying (A-124) service for ninety days. Consequently, notice should have been given by January 20, 1975, at the latest. It was not. Instead three weeks later, on February 10, another postponement was granted for ninety days. (A-129) This postponement was ineffective, not only because late, but also it was unauthorized because not "obtained on a <u>new</u> showing of exigent circumstances."

one might bicker with the inflexibility of this construction, failure to honor it is usurpation of the legislative function. Had Congress and the New York legislature wished to adopt a less rigid formula, ultimately, as protective of privacy, they had only to do so.*

Additionally, the statutes were violated by the postponements of notice of the "Fury orders". Although postponement is statutorily sanctioned, it is only in "exigent circumstances".

See page41 , n.* Criminal Procedure Law §700.05 (7) states:

> 'Exigent circumstances' means conditions requiring the presevation of secrecy, and whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that such surveillance had occurred.

It is submitted that it is a merely conclusory allegation: "That...the subject of the aforesaid eavesdropping warrant is currently under investigation by the Federal

*See for example, Title 18 U.S.C. §2518 (9) containing a more flexible timetable, but still requiring exclusion in violation thereof:

> The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. (emphasis added)

Bureau of Investigation. That notice of the said subject would result in the frustration of the continuing investigation into the crimes of Grand Larceny in the Second Degree,..." is insufficient to satisfy Criminal Procedure Law §700.50 (4). There are no factual allegations supporting the conclusion that the investigation would be "frustrated". In any event notice of wiretapping had already been given on July 24, 1974.* Any restraints caused by the prospective notice had been effected on July 24, 1974. No "exigent circumstances" were established, and the postponement was unauthorized.

Pursuant to Title 18 U.S.C. §2515, the failure to give notice during the statutory period requires suppression.

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*By the Nassau authorities with reference to the "Schnell order".

POINT V

PURSUANT TO RULE 17 OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT HEREBY INCORPORATES BY REFERENCE THE ARGUMENTS CONTAINED WITHIN CO-APPELLANT'S BRIEF

CONCLUSION

FOR THE FOREGOING REASONS APPELLANT'S CONVICTION MUST BE VACATED AND THE MOTION TO SUPPRESS GRANTED.

Respectfully submitted,

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DAVID W. McCARTHY
(Of Counsel)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
ss.:
COUNTY OF NASSAU)

Carmela Colling, being duly sworn, deposes and says: deponent is not a party to this action, is over 18 years of age and resides at 70 N. Grove St., Freeport, N.Y.

On December 22, 1976, deponent served the with Brief for Thomas Fury upon David Trager, United States Attorney, attorney for the People in this action at the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York.

Carmela Colling
CARMELA COLLING

Sworn to before me this
22nd day of December, 1976.

LAWRENCE F. SPIRN
Notary Public, State of New York
No. 31-4613055
Qualified in New York County
Commission Expires March 30, 19..78

Lawrence F Spirn